IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 24TH MAY 2007 / 3RD JYAISHTA 1929

CRP.No. 1758 of 2003()

REVN. PETITIONER: PETITIONER/JUDGMENT DEBTOR:

A. GOVINDAN, S/O. KANARAN,
KUNNUMMAL AMSOM, DESOM, VATAKARA.

BY ADV. SRI.G.UNNIIKRISHNON

RESPONDENT: RESPONDENT/DECREE HOLDER:

K.K. GOVINDA RAJAN, RAJA SREE,
KUNNUMMAL AMSOM, VATTOLI DESOM,
VATAKARA TALUK.

BY ADVS. M/S.B.KRISHNAN AND PARTHASARATHY

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 15/1/2007, THE COURT ON 24/5/2007 PASSED THE FOLLOWING:

I.A.NO.1583/2003 IN C.R.P.NO.1758/2003

DISMISSED

24/5/2007 SD/- K.T.SANKARAN, JUDGE

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AHZ/

K.T. SANKARAN, J.

C.R.P. NO. 1758 OF 2003 A

Dated this the 24th day of May, 2007

O R D E R

In this Civil Revision Petition, the judgment debtor challenges the order passed by the executing court rejecting his application for exemption from attachment and sale of his immovable property under clause (c) of the proviso to sub section (1) of Section 60 of the Code of Civil Procedure.

2. A money decree was passed against the petitioner herein on 12-4-1991. Immovable property having an extent of 21 cents was attached before judgment on 26-10-1990. Execution Petition was filed in the year 1991. In the Appeal filed by the revision petitioner against the decree, the High Court granted stay of execution on condition of furnishing security for the decree amount. The revision petitioner offered the property in question (which was attached before judgment) as security. In the application filed by the

judgment debtor to receive security, he stated that he was eking out his livelihood from the earnings as a driver.

3. In the counter dated 20-12-1001 filed by the judgment debtor in the Execution Petition, he stated that the land value of the property sought to be sold was Rs.1,05,000/- and that the market value of the property with improvements would be Rs.1,30,000/-. Decree was for a sum of Rs.33,504/- and the amount claimed in the E.P. was Rs.45,359/-

4. After dismissal of the Appeal, the Execution Petition was proceeded with. In 2003, the judgment debtor filed an application in the executing court claiming the benefit under clause (c) of the proviso to Section 60 (1) of the Code of Civil Procedure. He contended that he is an agriculturist eking out his livelihood by cultivating the property. He contended that he is residing with family in the house situated in the property sought to be sold. The decree holder

denied this case of the judgment debtor and contended that he is not an agriculturist and that he is not residing in the house in the property. There is no house in the property sought to be sold. The decree holder also raised a contention that the application is barred by res judicata since at the earlier stages of the execution the judgment debtor did not raise any contention as is now raised by him. The property was ordered to be sold on 24-6-2003. It was contended that the judgment debtor did not raise any objection to the attachment at any time before the order for sale was passed and therefore he is barred from raising such a contention. The judgment debtor filed a rejoinder statement and contended that though he was a driver earlier, he could not continue that job after undergoing a surgical operation. Now, he is not a driver, but an agriculturist.

5. Heard Sri. G. Unnikrishnan, learned counsel for the petitioner and Sri. Parthasarathy, learned counsel for the respondent.

6. Sub Section (1) of Section 60 of the Code of Civil Procedure provides that the property mentioned therein is liable to attachment and sale in execution of a decree. The proviso to sub section (1) states that the 'particulars' mentioned therein shall not be liable to such attachment or sale. Clause (3) of the proviso is the following:

> "houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist or a labourer or a domestic servant and occupied by him."

Explanation V to the proviso reads as follows:

> "For the purpose of this proviso, the expression "agriculturist" means a person who cultivates land personally and who depends for his livelihood mainly on the income from agricultural land, whether as owner, tenant, partner or agricultural labourer." Explanation VI states when such an agriculturist "shall be deemed to cultivate land personally".

7. On combined reading of clause (c) of the proviso to Section 60(1) and Explanation V thereto, I am of the view that in order to claim exemption under

clause (c), the judgment debtor must prove the necessary ingredients thereof. He has to prove that he is an agriculturist. There must be evidence to prove that he cultivates land personally and that he depends for his livelihood mainly on the income from agricultural land. He must also prove that there is a house in the property sought to be sold and that it is occupied by him. Even if all these ingredients are proved, exemption from attachment or sale could be claimed only in respect of the house and other buildings and the land immediately appurtenant thereto and necessary for their enjoyment. The judgment debtor has, therefore, to prove that the land sought to be sold forms part of the land appurtenant to the house or other building. The proviso to sub section (1) of Section 60 is in the nature of an exception to the general rule that lands or houses or other buildings or immovable property is liable to attachment and sale in execution of a decree. The existence of the necessary ingredients of clause (c) of the proviso, therefore, must be proved by the judgment debtor. The burden of

proof is certainly on the judgment debtor. Exemption from attachment and sale could be successfully claimed only in respect of that which is exempted and not the whole property of which the exempted portion forms part. In **Esthappanose V. Devamatha Kuries: 1992 (2) K.L.T. 793**, Justice Paripoornan (as his lordship then was) held that the burden to prove that the land and the building sought to be attached is entitled to exemption, is on the judgment debtor. It was held that the burden is on the judgment debtor to establish facts, clearly to bring his case within S.60 (1) (c) read with Explanation V. I respectfully follow the decision of Justice Paripoornan in **Esthappanose's case**. The judgment debtor did not adduce any documentary or oral evidence to prove that he is entitled to the exemption under clause (c). He has not proved that he is an agriculturist. Nor did he prove that he depends for his livelihood mainly on the income from agricultural land. The judgment debtor did not prove that the property sought to be sold includes a house occupied by him and that what is sought to be sold is

the house and appurtenant land.

8. In **Shrimant Appasaheb Tuljaram Desai and others V. Bhalchandra Vithalrao Thube: A.I.R. 1961 S.C. 589**, the Supreme Court, in the majority judgment, held: "The object of the exemption in cl.(c) apparently is that an agriculturist should not be left without a roof over his head. In other words, the Legislature intended by cls. (b) and (c) to prevent an agriculturist becoming destitute and homeless." It was also held thus :"It seems to us that even if it is not necessary that a person must till the land with his own hands to come within the meaning of the word 'agriculturist' he must at least show that he was really dependent for his living on tilling the soil and was unable to maintain himself otherwise." Explanation V, which was inserted by the Amendment Act of 1976, evidently contains this principle.

9. The judgment debtor failed to prove that he is entitled to claim exemption under clause (c) of the

proviso to Section 60 (1). The contentions raised by the revision petitioner are without merit. The order passed by the court below does not call for interference on this ground.

10. The learned counsel for the petitioner submitted that the court below erroneously thought the judgment debtor has waived his right to claim exemption from attachment, he having not raised any objection till an order was passed for sale of the property. The learned counsel submitted that the single bench decision in **Lalithamma V. Ramachandra Iyer: 1987 (1) K.L.T. 909** holding that there could be a waiver of the benefit of clause (c) requires re-consideration. He submitted that in Lalithamma's case, the learned Single Judge had not noticed sub section (1A) of Section 60 C.P.C. I do not think it is necessary to discuss this contention in great detail or to refer the case to a Division Bench in view of the finding I have already arrived at and also in view of the Division Bench decision in **Lakshmi V. State Bank of Travancore: 1987**

(1) K.L.T. 789. In **Lalithamma's case** (supra), the question considered was whether the judgment debtor would be barred by res judicata in claiming the benefit of clause (c) when he did not raise any objection to attachment and did not challenge the order for sale. It was held that res judicata would apply. After holding thus, it was further held thus: "It may also be noted that the prohibition contained in proviso (c) to S.60 (1) is not absolute and that the agriculturist can waive the benefit conferred on him. By not raising an objection to the sale, it may be inferred that the petitioner, even if she is an agriculturist entitled to the benefits of proviso (c) to S. 60 (1) has waived the benefit conferred on her by the said proviso." Sub Section (1A) of Section 60 provides that notwithstanding anything contained in any other law for the time being in force, an agreement by which a person agrees to waive the benefit of any exemption under the Section shall be void. In **Lakshmi's case** (supra), the question whether a mortgage of the land and house executed by the judgment debtor would amount to waiver

within the meaning of sub section (1A) was considered and it was held in the negative. It was held in Lakshmi's case thus: "It is not possible to treat execution of a mortgage governed by the provisions of the Transfer of Property Act as a waiver contemplated under sub-s. (1A) of S. 60 of the Code. The question of waiver would arise only in the context of attachment and sale in execution of a decree. The provision was introduced because of difference of opinion among various High Courts as to whether the benefit of exemption under S. 60 (1) could be waived by judgment debtors. It was to protect the interest of the beneficiaries of the exemption under proviso to sub-s. (1) that sub-s. (1A) was enacted by making it clear that there could be no waiver in the eyes of law." Lalithamma's case :1987 (1) K.L.T. 909 was decided after the Division Bench decision in Lakshmi's case. I am of the view that the finding of waiver in paragraph 4 of the judgment in Lalithamma's case does not hold good in view of the Division Bench decision in Lakshmi's case.

11. The learned counsel for the revision petitioner contended that even if the property is liable to be sold, it is not necessary to sell the whole extent of the property as sale of a portion of the property would be sufficient to realize the decree amount. He relied on the decisions of the Supreme Court in **Ambati Narasayya V. Subba Rao : A.I.R. 1990 S.C. 119.** In view of the decision of the Supreme Court, the court below should have considered this question before ordering sale of the entire property. The order impugned is set aside to that extent alone. The executing court shall consider the question whether it is necessary to sell the entire extent of property in one lot or whether it is sufficient to sell the property in different lots. The executing court shall allow the parties to adduce evidence on this aspect. The court below shall pass appropriate orders after hearing the parties on this question.

The Civil Revision Petition is allowed only to the extent indicated above.

(K.T.SANKARAN)
Judge

K.T.SANKARAN, J.

C.R.P.NO. 1758 OF 2003

O R D E R

24th May, 2007